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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 815

COMISARIA GENERAL DE ABASTECIMIENTOS Y TRANSPORTES, PETITIONER

v.

VICTORY TRANSPORT INCORPORATED

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

By order of the Court dated March 8, 1965, the Solicitor General was invited to express the views of the United States in the above-entitled case. This memorandum is submitted in response to that invitation.

STATEMENT

Petitioner, a branch of the Spanish Ministry of Commerce, voyage-chartered a vessel from the respondent shipowner, a New York corporation, to transport a cargo of wheat from the United States to Spain (Pet. App. 1a). The cargo had been surplus wheat purchased by petitioner pursuant to the Agricultural Trade Development and Assistance Act, 7 U.S.C. 1691,

et seq. (Pet. App. 2a). The charter provided that disputes between petitioner and respondent should be arbitrated by three arbitrators in New York, one to be appointed by each party and the third to be chosen by the two appointees (Pet. App. 2a). The arbitration clause also provided that for the purpose of enforcing any award, "this agreement may be made a rule of the Court" (Pet. App. 2a).

When the cargo was discharged in two Spanish ports, the hull of respondent's vessel was damaged, allegedly because the ports were unsafe (Pet. App. 2a). Petitioner refused to pay for the damage or to submit the matter to arbitration, and respondent instituted the present action under Section 4 of the United States Arbitration Act, 9 U.S.C. 4, to compel arbitration of the dispute (Pet. App. 2a–3a). Pursuant to an *ex parte* order of the district court, service was made by registered mail at petitioner's office in Madrid, Spain (Pet. App. 3a–4a).

Thereafter, petitioner appeared specially and moved to vacate the service as unauthorized and to dismiss the petition to compel arbitration on the ground, *inter alia,* that petitioner was not subject to the jurisdiction of the court because of sovereign immunity (Pet. App. 20a). The district court overruled the petitioner's motions, holding that the service was sufficient and that the defense of sovereign immunity was not available because the transaction was "a commercial operation of the Spanish Government" (Pet. App. 22a). The court ordered petitioner to nominate an arbitrator and stated that if petitioner failed to do so, application

could be made to the court for its nomination of a person to serve as such arbitrator (Pet. App. 24a–25a).

The court of appeals affirmed the district court's order (Pet. App. 19a). It held that in the absence of any communication from the Department of State supporting a sovereign's claim of immunity from suit, courts should sustain a claim of immunity only if "it is the established policy of the State Department to recognize claims of immunity" of the type presented (Pet. App. 8a). Relying upon a 1952 letter from the Department of State's then Acting Legal Adviser, Jack B. Tate, to the Attorney General (26 Dept. State Bull. 984 (1952)), the court of appeals held that the governing rule was the so-called "restrictive theory" of sovereign immunity—*i.e.*, that there is immunity for a foreign government's public or sovereign acts (*jure imperii*) but not for its private or commercial acts (*jure gestionis*) (Pet App. 6a–10a). The court enumerated five categories of acts within the "public" classification, and limited immunity to those categories (Pet. App. 10a–11a).[1] It concluded that the transaction engaged in by petitioner fell outside these five categories, that it had the character of a private commercial act, and that, therefore, petitioner's claim of sovereign immunity should not be recognized (Pet. App. 11a–15a).

[1] The five categories were: (1) internal administrative acts, such as expulsion of an alien; (2) legislative acts, such as nationalization; (3) acts concerning the armed forces; (4) acts concerning diplomatic activity; (5) public loans.

The court of appeals also likened petitioner to a private foreign corporation or association for purposes of determining whether the district court had acquired *in personam* jurisdiction and whether the service of process was sufficient. Relying upon two of its earlier decisions involving non-sovereign defendants,[2] the court held that a party's agreement to arbitrate in New York is a sufficient basis for a New York court to acquire jurisdiction over the party if it effects extraterritorial service by mail (Pet. App. 16a–17a). The court also held that the service of process by mail was authorized by the Federal Rules of Civil Procedure (Pet. App. 18a).[3]

DISCUSSION

In our view the decision below raises important questions which should ultimately be decided by this Court, but the manner in which petitioner has chosen to frame the issues leaves us doubtful whether what we conceive to be the underlying and truly important questions will be adequately presented to the Court.

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[2] *Farr* v. *Cia Intercontinental de Naregacion*, 243 F. 2d 342 (C.A. 2); *Orion S. & T. Co.* v. *Eastern States Petro. Corp. of Panama*, 284 F. 2d 419 (C.A. 2).

[3] The court of appeals relied upon Rule 4(d)(3), incorporated by reference into Rule 4(d)(7), which authorizes service upon a foreign corporation or unincorporated association in the manner employed in the State courts. The court also invoked Rule 4(e), which, as of the date of the service in the instant case, authorized service upon parties outside of the State whenever "a statute of the United States or an order of court provides for [such] service * * *." The court noted that the service in this case was effected pursuant to an order of the district court (Pet. App. 18a).

1. The predicate of the court of appeals' decision is acceptance of the restrictive theory of sovereign immunity holding that foreign sovereigns are not entitled to immunity from imposition of liability arising out of "commercial" or "private" rather than "governmental" transactions. While we believe the decision to be correct,[4] this is the first time that a federal court has unequivocally upheld the restrictive theory of sovereign immunity.

Following the opinion of Chief Justice Marshall in *The Exchange,* 7 Cranch 116, which stated that the person of a foreign sovereign, his ministers and troops, and his ships of war, are exempt from the jurisdiction of domestic courts, the courts of both this country and England repeatedly held that foreign sovereigns, as well as their property, were generally immune from suit. See, *e.g., L'Invincible,* 1 Wheat. 238, 255–256; *Oliver American Trading Co.* v. *Government of the United States of Mexico,* 5 F. 2d 659 (C.A. 2); *Mason* v. *Intercolonial Railway,* 197 Mass. 349, 83 N.E. 876; *The Parlement Belge,* [1879–1880] L.R., 5 P.D. 197; *Mighell* v. *Sultan of Johore* [1894] 1 Q.B. 149.

During the latter part of the nineteenth century and the early part of this century, it was often argued here and in England that sovereign immunity should

[4] Although we agree with the courts below that petitioner was not entitled to prevail in this action, we do not at this stage express an opinion on the Second Circuit's particular formulation of a restrictive theory of sovereign immunity or even upon the distinction between governmental acts and commercial or private acts.

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not extend to a sovereign's merchant vessels or vessels employed by a sovereign in trading.[5] However, in *Berizzi Bros. Co.* v. *S. S. Pesaro*, 271 U.S. 562, this Court rejected the "restrictive theory" argument and held that "a ship owned and possessed by a foreign government, and operated by it in the carriage of merchandise for hire, is immune from arrest under process based on a libel *in rem* by a private suitor in a federal district court exercising admiralty jurisdiction." 271 U.S. at 570.[6] The *Berizzi* case is the only one in which this Court has rendered a decision on the question.[7]

Sovereign immunity has, of course, never been absolute in the literal sense, and immunity has been withheld under certain circumstances.[8] The decision

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[5] See, *e.g.*, *The Pesaro*, 255 U.S. 216; *Ex parte Hussein Lutfi Bey*, 256 U.S. 616; *The Parlement Belge*, [1879–1880] L.R., 5 P.D. 197.

[6] A few years earlier, the Court of Appeal in England had also held that a vessel of a foreign sovereign used in ordinary commerce was entitled to immunity, *The Porto Alexandre*, [1920] P.D. 30.

[7] In *Mexico* v. *Hoffman*, 324 U.S. 30, while holding that courts should normally grant or withhold immunity to foreign sovereigns "in conformity to the principles accepted by the department of the government charged with the conduct of our foreign relations" (324 U.S. at 35), the Court nevertheless specifically pointed out that "we have no occasion to consider the questions presented in the *Berizzi* case" (324 U.S. 35, n. 1).

[8] Sovereign immunity is not an available defense with respect to prize taken in violation of our neutrality. *The Santissima Trinidad*, 7 Wheat. 283, 353. Vessels owned by sovereigns but not possessed by them are not entitled to immunity. *Compania Espanola* v. *Navemar*, 303 U.S. 68; *Mexico* v. *Hoffman*, *supra*; *Long* v. *The Tampico*, 16 Fed. 491 (S.D. N.Y.). Moreover, several courts in this country have held that agencies or in-

below, however, in declining to recognize a claim of sovereign immunity because of the commercial character of the transaction seems to be the first clear-cut departure by an American federal court from the so-called absolute theory of sovereign immunity upheld in *Berizzi Bros. Co.* v. *S. S. Pesaro, supra.*[9] Moreover, as petitioner indicates, the Second Circuit's decision here is apparently the only federal case to uphold an *in personam* action against an objecting foreign sovereign or its unincorporated agency or department.[10]

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strumentalities of a foreign sovereign which are separate corporate entities are not exempt from the jurisdiction of our courts. *Coale* v. *Société Co-op. Suisse Des Charbons, Basle*, 21 F. 2d 180 (S.D. N.Y.); *United States* v. *Deutches Kalisyndikat Gesellschaft*, 31 F. 2d 199 (S.D. N.Y.); but *cf.*, *Baccus* v. *Servicio Nacional Del Trigo*, [1956] 3 All E.R. 715. In addition, it is well-settled that a foreign sovereign who voluntarily appears in an action without asserting sovereign immunity, has waived the defense. *The Sao Vicente*, 281 Fed. 111 (C.A. 2); *Flota Maritima Browning de Cuba* v. *Motor Vessel Ciudad*, 335 F. 2d 619 (C.A. 4).

[9] A few state court decisions have apparently indorsed the so-called "restrictive theory." *Pacific Molasses Co.* v. *Comite De Ventas De Mieles*, 219 N.Y.S. 2d 1018; *Three Stars Trading Co.* v. *Republic of Cuba*, 222 N.Y.S. 2d 675; *Harris and Company Advertising, Inc.* v. *Republic of Cuba*, 127 So. 2d 687 (Fla.).

[10] This Court's decisions dealing with foreign sovereign immunity have been actions against vessels. However, the lower courts have applied the same principles of sovereign immunity in *in personam* actions. *Oliver American Trading Co.* v. *Government of the United States of Mexico*, 5 F. 2d 659 (C.A. 2); *United States ex rel. Cardashian* v. *Snyder*, 44 F. 2d 895 (C.A.D.C.), certiorari denied, 283 U.S. 827; *Puente* v. *Spanish Nat. State*, 116 F. 2d 43 (C.A. 2), certiorari denied, 314 U.S. 627; *Sullivan* v. *State of Sao Paulo*, 122 F. 2d 355 (C.A. 2);

Whether the court of appeals decided this issue correctly is a substantial question worthy of certiorari. Since the decision below will govern all similar contracts in the New York area—a center of international commercial activity—it has great importance. However, petitioner has apparently chosen not to present the foregoing question. At page 3 of its reply brief petitioner expressly disavows any reliance upon the absolute theory of immunity and contends that the questions it raises are presented even if "the shipping transaction here involved was of a commercial nature so as to preclude a defense of sovereign immunity * * * ."

2. The first question presented by the petitioner is whether it can be held, by executing the agreement to arbitrate, to have consented to the subsequent assertion of *in personam* jurisdiction to enforce arbitration of a dispute arising under the agreement containing the arbitration clause. That question, as framed by petitioner (Pet. 2), is much broader than any issue decided by the court of appeals. There is no suggestion anywhere in the court's opinion that the holding extends beyond "commercial" agreements and "commercial" activities, and the fact that the court predicated its opinion upon the restrictive theory of sovereign immunity negates any such inference. Petitioner's argument, therefore, necessarily narrows down to the contention that even though the restrictive theory of

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Matthews v. *Walton Rice Mill*, 176 F. 2d 69 (C.A.D.C.); *Adatto* v. *United States of Venezuela*, 181 F. 2d 501 (C.A. 2); *Loomis* v. *Rogers*, 254 F. 2d 941 (C.A.D.C.), certiorari denied, 359 U.S. 928.

sovereign immunity be accepted for the purpose of determining whether courts of the United States will impose liability upon a foreign sovereign or its property in cases in which the court has jurisdiction, that distinction has no place in deciding whether a court has acquired jurisdiction *in personam*. To put the point concretely, petitioner apparently would concede that a district court with jurisdiction *in rem* over a Spanish vessel might enforce against the vessel a substantive liability growing out of a commercial transaction with the Spanish government, and it argues only that the same court could not enforce *in personam* an undertaking to arbitrate that was part of the same agreement.

Although we believe it to be unsound, a number of authorities contain language supporting a distinction between actions directly against a foreign government and actions begun by seizing the government's property. While not holding that the restrictive theory of sovereign immunity should apply in actions against property, such authorities nevertheless view the two types of actions differently. In an *in personam* action directly against the sovereign, these cases seem to hold that the sovereign status of the defendant is an initial bar to the court's acquiring jurisdiction over the party, leaving no room for the court to inquire further and determine whether a "defense" of sovereign immunity should be recognized. According to these cases, it is only in an action where the court has acquired jurisdiction by seizing the sovereign's property that the court is empowered to examine the surrounding circumstances and nature of the transaction for

the purpose of deciding whether immunity from suit should be recognized. See, *e.g.*, *Puente* v. *Spanish Nat. State,* 116 F. 2d 43, 44–45 (C.A. 2), certiorari denied, 314 U.S. 627; *Adatto* v. *United States of Venezuela,* 181 F. 2d 501 (C.A. 2); *Petrol Shipping Corp.* v. *Kingdom of Greece,* 326 F. 2d 117 (C.A. 2) (decision of panel which was subsequently altered by the full court and the case remanded, 332 F. 2d 370); *Compania Mercantil Argentina* v. *United States Shipping Board,* 131 L.T.R. (n.s.) 388, 389 (Ct. of App.); *Kahan* v. *Pakistan Federation,* [1951] 2 K.B. 1003, 1011; *Baccus* v. *Servicio Nacional Del Trigo,* [1965] 3 All E.R. 715, 733.[11]

In the face of such support for the view that the question of *in personam* jurisdiction is different from the question of immunity from the imposition of substantive liability, we cannot urge it to be unworthy of this Court's consideration.[12] However, we seriously

[11] While the broad distinction recognized in these cases may be questionable, nevertheless it may be that in certain lin ited types of attempted *in personam* actions against foreign governments, an absolute immunity from jurisdiction over the party, should be accorded, with the court declining to inquire further to determine whether the facts of the case justify an exemption from suit. For example, where, in a claim against a foreign government, the proper party defendant is a personal sovereign, and such person is a guest in this country, a threshold absolute immunity from *in personam* actions should perhaps be accorded. The same may be true of ambassadors and ministers to this country. However, if such immunity is deemed appropriate, it may be more properly regarded as merely an immunity from service of process under certain circumstances.

[12] As the decisions of this Court dealing with foreign sovereign immunity have all involved actions against vessels, this Court has never directly considered the distinction which peti-

doubt the wisdom of considering the question apparently presented by the petitioner apart from the fundamental issue whether sovereign immunity from liability extends to transactions like the one involved in the instant case. In the first place the problem of differentiating between immunity from normal rules of jurisdiction and immunity from the imposition of liability where jurisdiction exists cannot be fairly decided without thoroughly examining the evolution of the legal doctrines and considerations of policy underlying both principles—an examination which leads, we will urge, to the conclusion that there is no sound ground of distinction. Secondly, although it is possible for this Court to assume *arguendo,* for purposes of a decision in this case, that sovereign immunity does not extend to commercial transactions, that assumption would inevitably enter into the body of our law to an extent which is undesirable without thorough examination of the question. In saying this we do not dispute petitioner's right to present its case in what-

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tioner evidently urges or the nature of a sovereign's immunity in an *in personam* action. With regard to the nature of sovereign immunity, this Court's opinions, all in *in rem* cases, have been somewhat unclear. In *The Exchange*, 7 Cranch 116, 137, the Chief Justice referred to the principle merely as an "exemption" from the jurisdiction of our courts. In *The Pesaro*, 255 U.S. 216, 218; *The Carlo Poma*, 255 U.S. 219; and *Berizzi Bros. Co. v. S.S. Pesaro*, 271 U.S. 562, 576, the Court seemed to view actions against foreign governmental property as exceptions to the district courts' subject matter jurisdiction. The language of *Ex parte Peru*, 318 U.S. 578, 587–588, suggests that sovereign immunity is merely a legal defense, providing a ground for relinquishing jurisdiction previously acquired. See also, *Ex parte Muir*, 254 U.S. 522, 532; *Ex parte Transportes Maritimos*, 264 U.S. 105, 108.

ever fashion it deems most effective, but we question, from the standpoint of the sound development of legal principles, whether the questions warrant certiorari unless a thorough examination of both aspects of the doctrine of sovereign immunity is to be presented.

3. The second question raised by petitioner, involving the method of serving process upon foreign governments, similarly merits review by this Court only if it is considered together with the broader questions of sovereign immunity. Under certain circumstances—such as attempted service upon ambassadors—principles of international law and considerations of foreign relations may require that service not be permitted. *Hellenic Lines Limited* v. *Moore,* C.A.D.C., decided March 25, 1965. But the instant case does not present such a situation. Petitioner does not and cannot challenge the court of appeals' holding that the Federal Rules of Civil Procedure permit extraterritorial service by mail upon a foreign corporation or unincorporated association if the law of the State in which the federal court sits permits such service. We know of no reason, apart from considerations of sovereign immunity, why an agency of a foreign government should not be treated as a foreign corporation or association for purposes of service. If the foreign government is deemed to be exempt from service because of its sovereign status, this would be merely an application of the principle of sovereign immunity which the court of appeals held to be inapplicable to the facts of this case.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted if the Court is satisfied that petitioner has presented, or intends to present, both aspects of the sovereign immunity question discussed above.

Respectfully submitted.

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